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No. 93-1535

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,
v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
and MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION OF EDISON ELECTRIC INSTITUTE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rules 21 and 37 of the Rules of the United States Supreme Court, the Edison Electric Institute (EEI) respectfully moves this Court for leave to file the brief *amicus curiae* annexed hereto. EEI has asked all of the parties for permission to file the attached *amicus* brief in this proceeding. EEI was able to obtain consent from the Petitioners, West Penn Power Co., Armco Advanced Materials Company, and Allegheny Ludlum Corporation, and Respondent Pennsylvania Public Utility Commission. However, Mon Valley Energy Corporation has not consented to EEI's participation. For that reason, we are requesting permission to file herein the attached *amicus* brief.

INTEREST OF EDISON ELECTRIC INSTITUTE

EEI is the association of the United States investor-owned electric utilities and their industry affiliates worldwide. EEI's U.S. members serve 99 percent of all customers served by the investor-owned segment of the industry. As of December 31, 1992, they generated approximately 79 percent of all the electricity in the country and serviced 76 percent of all ultimate customers in the nation. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern. West Penn Power Co. is a member of EEI.

EEI members must comply with all applicable requirements of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617 (1978) (PURPA). In particular, PURPA Section 210 requires utilities to purchase power from qualifying facilities (QFs) at rates which do not exceed the cost of power otherwise available, either from the utility's own generation resources or through purchases of electricity from others—"avoided" costs. 16 U.S.C. § 824a. EEI has a strong interest in assuring that its members are not forced to pay more than required by PURPA because, as recognized by Congress, purchases from QFs at rates above that level harm both utilities and their customers.

Purchases at inflated rates increase costs to utilities and their customers above those otherwise necessary. This is particularly a concern because the recent passage of Title VII of the Energy Policy Act of 1992, Pub. L. No. 102-486 (1992) (EPAct), encourages competition among wholesale electric suppliers. Such competition requires all utilities to minimize their costs, including the cost of electric power purchased from others. Nevertheless, many utilities have been required to purchase power from QFs at rates which are far in excess of their actual avoided costs.

During the past several years, the cost for obtaining supplies of new electric power has been rapidly declining, and the need for new generation plants has also declined substantially from the levels previously anticipated. These factors have contributed to a general reduction in actual avoided cost levels, although rates based on higher estimates are currently in effect. In fact, utilities are being forced to pay so many millions of dollars in excess of avoided costs that several state utility commissions are looking at ways to conform existing QF contracts to the lower-cost realities of today's electric power market.

EEI has a strong interest in this proceeding in order to address the important issue of assuring that the determination of avoided costs by a state utility regulatory commission is based on the reasoned consideration of all timely and otherwise relevant information presented to the commission. The state utility commission's actions in this case run counter to today's electric power market realities. The utility commission refused to accept timely evidence as to the proper avoided cost level, resulting in an imposed avoided cost level based solely on stale information pertaining to an expired contract.

As the national association of investor-owned electric utilities, EEI is in a position to reflect the impact of the issues raised in this proceeding from a broad perspective. The attached brief *amicus curiae* demonstrates that the questions arising in the instant case are substantial and have broad implications for the nation's electric utilities, their ratepayers, and the investors who provide the capital necessary to maintain the reliability and effectiveness of the nation's electric utility systems.

CONCLUSION

For the reasons set forth above and in the attached brief, EEI urges this Court to grant EEI's motion for leave to file the brief annexed hereto as an *amicus curiae*.

Respectfully submitted,

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QUESTIONS PRESENTED

Edison Electric Institute adopts the questions presented in the Petition for Writ of *Certiorari* of Petitioner West Penn Power Company.

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PENNSYLVANIA PUBLIC UTILITY COMMISSION
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On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

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BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

Amicus curiae Edison Electric Institute (EEI) respectfully prays that the Court grant the petition of West Penn Power Company for a writ of *certiorari* to the Commonwealth Court of Pennsylvania in this matter. Four parties to this case, Petitioners West Penn Power Company, Armco Advanced Materials Company, and Allegheny Ludlum Corporation, and Respondent Pennsylvania Public Utility Commission have consented to the filing of this brief. The motion of EEI for leave to file this brief *amicus curiae* in support of petitioner is attached hereto.

INTEREST OF *AMICUS CURIAE*

Edison Electric Institute (EEI) is the association of the United States investor-owned electric utilities and their industry affiliates worldwide. EEI's U.S. members serve 99 percent of all customers served by the investor-owned segment of the industry. As of December 31, 1992, they generated approximately 79 percent of all the electricity in the country and serviced 76 percent of all ultimate customers in the nation. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern. West Penn Power Co. (West Penn) is a member of EEI.

EEI members must comply with all applicable requirements of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617 (1978) (PURPA). In particular, PURPA Section 210 requires utilities to purchase power from qualifying facilities (QFs) at rates which do not exceed the cost of power otherwise available, either from the utility's own generation resources or through purchases of electricity from others—"avoided" costs. 16 U.S.C. § 824a. EEI has a strong interest in assuring that its members are not forced to pay more than required by PURPA because, as recognized by Congress, purchases from QFs at rates above that level harm both utilities and their customers.

During the past several years, the cost for obtaining supplies of new electric power has been rapidly declining, and the need for new generation plants has also declined substantially from the levels previously anticipated. These factors have contributed to a general reduction in avoided cost levels. Nonetheless, EEI's members have identified at least fifteen states wherein utilities are required to pay rates to QFs at levels significantly higher than actual avoided cost.[1] EEI and its members believe that utilities

[1] Arizona, California, Connecticut, Iowa, Maine, Minnesota, Missouri, New Hampshire, New York, North Dakota, Pennsylvania, Virginia, Washington, Wyoming, and Wisconsin.

are currently forced to pay hundreds of millions of dollars in excessive rates for QF power.[2] In fact, several state utility commissions are already looking at ways to conform existing QF contracts to the lower-cost realities of today's electric power market.[3]

QF purchases at inflated rates unnecessarily increase costs to utilities and their customers. This is of particu-

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[2] Testimony of Mark Scholander, General Counsel, Kansas City Power & Light Co., on behalf of EEI, before the Environment, Energy and Natural Resources Subcommittee of the House Government Operations Committee, August 6, 1993, Representative Mike Synar, Chair (regarding FERC's review of major issues facing the electric utility industry). EEI's testimony specifically noted that FERC initiated a rulemaking on the administrative determination of avoided costs in 1988, which considered whether state determinations of avoided cost are excessive. Supplemental Rulemaking, Docket No. RM88-6-000, IV FERC Stat. & Reg. ¶ 32,462 at 32,275 (June 16, 1988), 53 Fed. Reg. 24,099 (June 27, 1988) & 31,882 (Aug. 22, 1988). To this day, FERC has not acted further on that rulemaking. This history of inaction suggests that recourse to FERC for possible resolution of the situation would be of no avail.

[3] For example, on May 4, 1994, the California Public Utilities Commission issued an order stating that it will approve the restructuring of certain existing QF contracts, including service-curtailment and changes to payment schedules and escalation indexes. Order Instituting Investigation on the Commission's Own Motion to Implement the Biennial Resource Plan Update Following the California Energy Commission's Seventh Electricity Report, Docket I. 89-07-004, Decision D. 94-05-018. Also, on April 5, 1994, the New York Public Service Commission was asked to act on a pending August 14, 1992 petition to curtail present QF purchase obligations, in an effort to prevent operational problems and save more than $100-million (just for that one utility) by the end of the century. Letter of Pond, G., Sr. Counsel, Niagara Mohawk Power Corp., *re Niagara Mohawk Power Corp. for Approval of Curtailment Procedures*, Case 92-E-0814, and *Proceeding on Motion of the Commission to Establish Conditions Governing Curtailment Clauses in Contracts for On-Site Generation*, Case 88-E-081. Recently, Maine created a public fund out of which utilities are to be able to withdraw moneys to be used to buy out of QF contracts. Legislative Document Number 1997, 1994 Session Laws, Chapter 712, 1994 Me. Legis. Serv. Ch. 712 (S.P. 774) (West) slip copy.

lar concern because of the recent passage of Title VII of the Energy Policy Act of 1992, Pub. L. No. 102-486 (1992) (EPAct). The EPAct has encouraged and facilitated increased competition among wholesale electric suppliers. This competition requires all utilities to minimize their costs, especially the cost of electric power purchased from others, including QFs. Utilities which cannot lower such costs are put at great risk of losing customers—large customers in particular. Such losses then raise costs to the remaining, mostly residential and small business, customers.

Despite this ever-increasing need to reduce costs, many utilities have been required to purchase power from QFs at rates which are now far in excess of their actual current or projected avoided costs. With so many utilities required to pay excessive amounts for power, the industry faces unnecessarily increased financial uncertainty in a time of already heightened market apprehension about utility economic difficulties.[4] Moreover, the economy suffers from unnecessarily increased electric prices at a time when competitive concerns demand that they remain low.

EEI has a strong interest in this proceeding in order to address the important issue of assuring that the determination of avoided costs by a state utility regulatory commission is based on the reasoned consideration of all timely and otherwise relevant information which may be submitted to the commission. The state utility commission refused to accept timely evidence as to the proper avoided cost level, resulting in an imposed avoided cost

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[4] *Forbes*, Lubove, S., "Another monopoly bites the dust," 42-44 (May 23, 1994); *Barron's*, Bary, A., "Power Down—New threat to utility shares: dividend cuts by healthy companies," 15-16 (May 16, 1994); *Wall Street Journal*, Solomon C., "Power Plays—As Competition Roils Electric Utilities, They Look to New Mexico—Move by Las Cruces to Flee Its High Rates Illustrates The Many Hurdles Ahead—Tangled Transmission Wires," A1, A9 (May 9, 1994).

level based solely on stale information pertaining to an expired contract. The utility commission's actions in this case run directly counter to the realities of today's electric power market. Actions such as this have extremely harmful repercussions to EEI's members, to the nation's economy, and ultimately to all citizens.

SUMMARY OF ARGUMENT

This case deals with the determination by the Pennsylvania Public Utility Commission ("Commission" or "PUC") directing West Penn to purchase power from a QF at a level substantially higher than the cost West Penn would otherwise incur as of the date of the Commission action. The Commission required West Penn to purchase this power despite the fact that the QF developer failed to satisfy milestones in a previously existing, expired purchase agreement. Despite this failure to comply with an agreed-upon contract, the developer was allowed to use the contract signing date as the date for calculating the cost of power otherwise available to West Penn—West Penn's avoided cost. The Commission also failed even to accept, much less consider, evidence relevant to a more timely avoided cost calculation. Such evidence would have shown substantial declines in West Penn's avoided cost. Instead, by failing to revise its previous avoided cost determination, the Commission allowed the QF to benefit from what by then had become an unrealistic and clearly excessive cost estimate based on exceedingly stale data.

EEI submits that it is essential to the goals of PURPA that any determination, whether explicit or implicit, by state utility commissions of the cost of power otherwise available to utilities be as accurate as is reasonably feasible. EEI also stresses that in order to comply with PURPA's goals, state utility commissions, in making explicit or implicit administrative determinations of current or projected avoided cost levels, must admit and consider

all relevant evidence submitted to demonstrate the avoided cost as of, or reasonably close to, the date of state commission action. As more fully explained below, EEI respectfully urges the Court to grant West Penn's Petition for a Writ of *Certiorari*.

REASONS FOR GRANTING THE PETITION

I. BACKGROUND

A. The Relevant Statute and Regulations

This case concerns the "avoided cost" provisions of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617 (1978) (PURPA). Section 210, subsections (a)(2), (b), and (d), of PURPA requires utilities to purchase power from QFs at rates which are "just and reasonable," "in the public interest," and do not exceed "the incremental cost to the electric utility of alternative electric energy"—the "avoided" cost standard. 16 U.S.C. § 824(a)-3(a)(2), (b), & (d). PURPA and regulations of the Federal Energy Regulatory Commission (FERC) delegate to state utility commissions the authority to determine each utility's avoided cost. PURPA § 210(f), 16 U.S.C. § 824a-3(f); Small Power Production and Cogeneration Facilities—Regulations Implementing Section 210 of [PURPA], Docket No. RM79-55, Order No. 69, FERC 1977-1981 Stat. & Reg., Reg. Preambles, ¶ 30,128, at 30,862, 30,864 (1980).

FERC's regulations pursuant to PURPA essentially repeat PURPA's avoided cost requirement, specifying that the rates for purchases from QFs must "[b]e just and reasonable to the electric consumer—and in the public interest" and not "more than the avoided costs" of the utility. 18 C.F.R. § 292.304(a)(1)(i) & (a)(2). Those purchase rates may "differ from avoided costs at the time of delivery" when "based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation" (referred to herein as "projected avoided costs"), especially when "calculated [as of] the

time the obligation is incurred." 18 C.F.R. § 292.304 (b)(3) & (d)(2)(ii). Nonetheless, FERC intended its rules to insure that "the total payment over the duration of the contract term does not exceed the estimated avoided costs . . . ." Order No. 69, *supra*, at 30,881. In that context, FERC clearly intended "contract" to include any "legally enforceable obligation." *Id.* at 30,880. Reflecting a federal policy favoring freely negotiated contracts, utilities also may contract for rates which differ from those established pursuant to the state's PURPA regulations. 18 C.F.R. § 292.301(b)(1).

B. The Facts Herein

EEI adopts the statement of facts presented in West Penn's Petition, and so will briefly restate only their essence. Although the course of the litigation below was somewhat convoluted, the facts of this case are straightforward. Originally, West Penn had voluntarily entered into a contract to purchase electric power from Respondent Mon Valley Energy Corp. (Mon Valley), from Mon Valley's Shannopin Mine Project (Shannopin), a QF under PURPA. Petitioner's Appendix (Pet. App.) E at 36a-39a. West Penn then sought to have the Commission approve the contract, and allow the power purchase costs to be recovered in rates ("passed through") to West Penn's retail electric customers—the "electric consumers" referred to in PURPA. The Commission acted as requested by the company, but did so without a hearing. *Id.* at 72a-75a.

Certain industrial customers of West Penn objected to the lack of a hearing, and sought to participate in the proceeding. They appealed to the state courts and won that right. *Barasch v. Penn. PUC*, 546 A.2d 1296, *modified*, 550 A.2d 257 (1988), *appeal denied*, 567 A.2d 655 (1989). However, the ensuing administrative hearing was not held until the (already once-postponed) Shannopin project milestone dates had almost expired. Pet. App's F-K and P-T. By the time the Commission was ready to

rule again, the project milestone dates had long passed, and the effectiveness of the contract had ended by its own terms. *Id.* Significantly, over those years of litigation, West Penn's situation had changed so much that it no longer needed the QF's power at all. *Id.* Therefore, West Penn sought to have the Commission recalculate the company's avoided costs. *Id.* However, the Commission refused to do so, and declined even to admit testimony related to West Penn's then-current projected avoided costs, stating that the rate issue was beyond the scope of the proceeding. Pet. App. T at 386a, 387a, and 393a. Nonetheless, the Commission approved all of Mon Valley's requested modifications to the QF power purchase arrangement, which included substantial changes both to the nature and the ownership of the project, in addition to modifications of project timelines. *Id.* at 387a-390a; see Pet. App. S at 352a-359a.

C. The Rulings Below

In this case, the Commission determined that it needed " 'to insure that litigation delays do not become the factor that determines whether a project proceeds or fails.' " *Id.* at 383a, *quoting Armco Advanced Materials Corp. v. Penn. PUC*, 579 A.2d 1337 (1990), 634 A.2d 207 (1993), *cert. pending*, No. 93-1341 (Feb. 22, 1994) ("*Armco*"); *also* at 382a-383a, 385a-386a, 391a, 394a; *citing* Pet. App. J at 258a-259a, 267a. The Commission held that (1) the contract had not lapsed and (2) that the original signing date controlled the avoided cost calculation. *Id.* at 385a, 390a, 392a. The Commission based its ruling on *Armco*, an appeal of an earlier Commission decision in another case. *See id.* at 383a, 384a, 388a, 390a.

In *Armco*, the Commonwealth Court of Pennsylvania (a lower state court) had held that, because a QF contract had been filed for Commission approval, (1) it was no longer an agreed-upon contract, (2) it therefore had not expired despite the lapse of project milestone dates, and (3) consequently, the original signing date controlled

the avoided cost calculation. *Id.* The Pennsylvania Supreme Court upheld the *Armco* decision, by an evenly divided court, without discussion. However, a separate opinion for three justices concurred in the finding that the contract was no longer agreed-upon, thereby agreeing that the Commission had broad authority to modify the power-purchase terms. *Id.*

The Commonwealth Court also upheld the Commission decision in this case. However, a dissent by three judges recognized that the result could be inappropriate from the ratepayers' perspective, and so violate PURPA's avoided cost requirement. *West Penn Power Co. v. Penn. PUC*, 615 A.2d 951 (1992). The Pennsylvania Supreme Court, despite that dissent below, denied discretionary review of the lower court decision without discussion. Pet. App's A and B.

II. THE STATE UTILITY COMMISSION'S ORDER HERE VIOLATES THE REQUIREMENT OF PURPA THAT PURCHASES FROM QFS BE AT RATES NO GREATER THAN FULL AVOIDED COST, BECAUSE THE COMMISSION FAILED TO ADMIT AND CONSIDER ALL TIMELY AND OTHERWISE RELEVANT INFORMATION AND DETERMINE THE UTILITY'S ACTUAL AVOIDED COSTS

The Commission's action in this case clearly violated PURPA in several ways. The Commission unreasonably failed to admit or consider evidence offered for the record as to the proper level of avoided costs. By requiring West Penn to purchase power from Mon Valley's Shannopin project when West Penn no longer needed any new capacity, at an avoided cost level inflated by using data computed many years prior to the Commission's order, the Commission clearly abused whatever discretion it may have under PURPA.

The resulting QF purchase rate clearly and unjustifiably exceeded the utility's avoided costs calculated as of, or

reasonably close to, the time that the Commission issued its order. The Commission's actions had a significant and adverse impact on rates to West Penn's electric consumers. Petition at 16. Thus, that action involved an implicit avoided cost determination, despite the Commission's assertion that rate issues were beyond the scope of the proceeding.

This Court has recognized that, under PURPA, the avoided cost is the maximum rate that a utility can be required to pay for a QF's power, and has upheld FERC's regulations imposing the payment of full avoided cost. *American Paper Inst. v. AEP Service Corp.*, 461 U.S. 402 (1983). This Court has also recognized that the states have considerable discretion in determining how they will implement the PURPA requirements. *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 2133 (1982). Similarly, FERC has itself said that state utility commissions have considerable discretion in determining avoided cost levels. *American REF-FUEL Co.*, 47 FERC ¶ 61,547 (1989).

A state utility commission's discretion, however, is not so broad as to enable it to refuse even to admit, much less consider, evidence a utility offers to demonstrate its then-current projected avoided cost—particularly when such refusal results in a rate which exceeds the utility's actual current or projected avoided cost—just as zoning boards cannot act in a manner which is arbitrary or irrational. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121, 103 S.Ct. 505, 509 (1982). Indeed, commissions have an obligation under PURPA and pursuant to FERC regulations to ensure that all relevant factors are considered and fully addressed when determining a utility's avoided cost, when approving the avoided cost estimate embodied in a requested QF purchase rate, or when imposing on a utility a QF power-purchase obligation which encorporates a previously determined avoided cost level. *See* 18 C.F.R. § 292.304(e). Such factors surely must include the level of projected avoided costs calculated as

of, or reasonably close to, the date of the Commission's action.[5]

As recently recognized by the Supreme Judicial Court for the Commonwealth of Massachusetts, there are limits on the discretion of a state utility commission, particularly when that would force a utility to pay a rate which exceeds its actual avoided cost. That court held it error for that commission to fail to address the question of whether it was necessary to modify a QF power purchase arrangement to reflect current, unanticipated facts. *Boston Edison Co. v. Mass. Dep't of Public Utilities and another*, No. SJC-06418 (attached as Appendix to this Brief), *Amicus* Appendix 1a, 9a (Apr. 8, 1994).

In this case, the Commission acted without even admitting, much less considering, evidence as to the appropriate avoided cost level as of, or reasonably close to, the time of its decision. Without such evidence and consideration, the Commission could not reach a reasoned decision on whether it was appropriate to impose on West Penn a QF power-purchase obligation using an avoided cost level agreed upon by the parties to an already expired contract, entered into several years earlier, under very different economic circumstances. Indeed, the fact that the Commission accepted and considered new evidence which Mon Valley offered to bolster its request to modify the Shannopin agreement demonstrates the feasibility and propriety of reviewing all new evidence before issuing a decision. This must include the avoided cost evidence offered by West Penn.

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[5] EEI does not question the ability of state utility commissions to consider appropriate requests for relief in light of current circumstances. Many states do now, or are planning soon to, exercise considerable authority to review and perhaps modify such arrangements, including agreed-upon contracts. *See* Note 3, *supra*. However as noted by Petitioner, state courts are divided over certain aspects of state commission determinations of avoided costs and other regulation of QF power purchase arrangements. Petition at 21-24.

The Commission should have developed a complete record, reflecting all relevant facts, and then justified the resulting avoided cost level based upon the entirety of that record.[6] The Commission failed to accord West Penn the same procedural opportunity to present evidence as accorded to Mon Valley. This fact constitutes an unreasonable and insupportable application of the Commission's responsibilities under PURPA and FERC regulations.

Whatever discretion state utility commissions have in implementing PURPA, in this instance the Commission has surely exceeded the bounds of that discretion. In times of rapidly changing projections of the need for and cost of future generation, particularly when, as now, both of those projections are declining, state utility commissions must look at timely, current information if they are to engage in reasoned decisionmaking. State commissions must ensure that ratepayers are charged a just and reasonable amount in the public interest by ensuring that a utility pays no more than its actual avoided cost for a QF's power. This is so especially when the rate is to continue for an extended period, and when the alternative is a rate which grossly exceeds the utility's actual avoided cost, both of which factors appear in this case. Otherwise, utilities and their customers would pay substantially excessive costs, which is most assuredly not in the public interest, and therefore a direct violation of PURPA.

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[6] One question to address in such a consideration is why or how a QF can extend performance dates due to regulatory and litigation factors not totally in its control, while a utility cannot reflect changes in its avoided cost which arise from economic and legislative developments which are surely not in its control.

CONCLUSION

WHEREFORE, Edison Electric Institute prays that this Court grant West Penn Power Company's Petition for a Writ of *Certiorari* to the Commonwealth Court of Pennsylvania in this matter.

Respectfully submitted,

PETER B. KELSEY *
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May 20, 1994

APPENDIX

APPENDIX

SUPREME JUDICIAL COURT
FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Douglas S. Horan, Esquire
Boston Edison Company
800 Bolyston Street
Boston MA 02199

RE: No. SJC-06418

BOSTON EDISON COMPANY

vs.

DEPARTMENT OF PUBLIC UTILITIES

NOTICE OF DECISION

Enclosed please find a copy of the decision rendered by the court in the above-styled case.

Very truly yours,

Jean M. Kennett, Clerk

Dated: April 8, 1994

S-6418 S.J.C.

BOSTON EDISON COMPANY

vs.

DEPARTMENT OF PUBLIC UTILITIES & another.[1]

Suffolk. January 6, 1994.—April 8, 1994.

Present: Liacos, C.J., Wilkins, Abrams, Lynch & O'Connor, JJ.

Department of Public Utilities. Public Utilities, Electric company, Contract with nonutility generator. *Energy Facilities Siting Council. Administrative Law*, Agency, Decision.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on July 15, 1993.

The case was reported by *Wilkins*, J.

Douglas S. Horan (*Roscoe Trimmier, Jr.*, with him) for the plaintiff.

Robert J. Munnelly, Jr., Assistant Attorney General, for the defendant.

John A. DeTore (*Alan K. Posner* with him) for the intervenor.

WILKINS, J. The plaintiff (Edison) has appealed (G. L. c. 25, § 5 [1992 ed.]) from a decision of the Department of Public Utilities (department), issued on June 25, 1993, in D.P.U. 92-130, in which the department rejected Edison's request to be relieved from a previously imposed requirement that it enter into a contract to purchase power from a nonutility generator. Edison argues that the department's decision must be set aside, asserting that, if implemented, that decision would impose an un-

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[1] Altresco Financial, Inc., intervenor.

necessary financial burden on Edison and its customers because Edison has no need for an additional power source in the immediate future. The department responds that in its 1991 decision in D.P.U. 90-270 it concluded that Edison should proceed to seek a nonutility source of power and that, in its attempt to be relieved from that obligation, Edison has made no showing sufficient to justify reconsideration of the 1991 decision. A single justice of this court reported the case to the full court without decision.

This case involves the operation of two State regulatory processes conducted by separate agencies that shared a common concern; Edison's needs for electric power. The first of these regulatory processes concerns the department's implementation of certain aspects of the Federal Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. §§ 796 and 824a-3 [1988]), enacted to encourage the development of alternative power sources that would reduce the demand for fossil fuels. To encourage the development of a competitive market for alternative power generation, the department adopted regulations that require electric utilities to request project proposals from qualifying facilities for the furnishing of electric power pursuant to long-term, fixed-price contracts. See 220 Code Mass. Regs. §§ 8.00-8.07 (1985). Under the department's regulations, to be eligible for acceptance, any project proposal from a nonutility generator must be priced below the relevant utility's calculated long-term avoided costs of power, that is, the costs that the utility would incur in obtaining that power if the long-term contract were not entered into with the nonutility generator. See 220 Code Mass. Regs. § 8.05(3). PURPA refers to this as "the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3. Obviously, a utility's cost of additional power will vary depending on whether the utility can generate that power within its existing capacity or whether it must incur the expense of constructing new generating capacity. Just as obvious is

the fact that the anticipated demand by a utility's customers for electric power will be a significant factor in determining the utility's perceived need for new generating capacity and, hence, in determining its avoided costs.

The appeal in this case arises from the effects of the regulatory process that we have just described. The department's 1991 decision, which we shall discuss in greater detail shortly, obliged Edison to proceed with a request for proposals which, in turn, led to Edison's selection of the intervenor Altresco Financial (Altresco) as the qualifying facility with which Edison would contract for specific megawatts of power.

Edison's argument that there has been a significant change in circumstances relies on a decision made by the second regulatory agency concerned with Edison's power needs, the Energy Facilities Siting Council (council or siting council). At the times significant for our purposes, under G. L. c. 164, § 69I (1992 ed.), Edison was obliged to "file with the council a long-range forecast with respect to the electric power needs and requirements of its market area." [2] On May 1, 1990, Edison filed with the council its 1990 long-range demand forecast, supply plan, and a proposal to build a 306-megawatt electric generating facility. The council held public hearings over many days, received updated information, and on April 10, 1992, issued a final decision in which it found that "Edison can be anticipated to experience a capacity surplus totalling 149 MW [megawatts] in 1996, and 120 MW in 1997." [3]

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[2] St. 1992, c. 141, effective September 1, 1992 (*id.* § 55), changed the name and functions of the siting council and merged it into the department, but not under the department's control and supervision. The department, and not the council's successor, now has the obligation to review electric utility long-range forecasts. See G. L. c. 164, § 69I, as appearing in St. 1992, c. 141, § 12.

[3] The siting council's decision acknowledged the expected availability of power from a nonutility generator selected in response to the request for proposals but noted that there would be surpluses even without that new power source.

We now discuss the department's 1991 decision, the one that Edison argues the department should have agreed to reconsider and did not. The proceeding commenced on October 15, 1990, when Edison filed for approval of a proposed draft of its request for proposals from non-utility generators desiring to sell electric energy and capacity to Edison under a long-term contract pursuant to the procedures outlined in the department's regulations. In May, 1991, Edison moved that the department defer action on its proposal until the siting council acted on Edison's May 1, 1990, filing of its long-range plan with the council. Edison argued that the council might decide that whatever purchases of power the department might order would be unneeded and that the cost of the avoidable unit to be used in establishing the conditions of any request for proposals would depend on conclusions reached by the council.

In a decision issued on August 16, 1991, the department rejected Edison's request for delay but modified its normal process by establishing a range for the electrical capacity to be sought through Edison's requests for proposals. The department tentatively set the supply block at 306 megawatts, the capacity of Edison's then proposed plant, subject to adjustment by the department following the siting council's determination of Edison's needs. The department also set a minimum supply block of 132 megawatts, which was equal to 5% of Edison's current annual peak load. See 220 Code Mass. Regs. § 8.05(2)(b). The department stated that this minimum supply block would be required even if the siting council should "find no need for [Edison] to bring any additional supply into service within the next 20 years." The department did not say, however, that, if Edison needed no additional supply, the cost of Edison's proposed new plant would cease to be the appropriate unit for determining avoidable costs for the purposes of accepting bids from qualifying facilities. The department in effect said that, if the bid price was right, Edison would have to purchase

power and capacity from a nonutility generator, even if Edison did not need additional generating capacity. Edison did not appeal to challenge the requirement that it use the cost of its proposed new plant in determining the avoidable costs to be used as a price ceiling on bids to be submitted in response to its request for proposals. Nor did Edison appeal to challenge the requirement that, whatever its needs, if the bid price was right, Edison must enter into a contract with a nonutility generator for the purchase of at least 132 megawatts of power.

On January 27, 1992, the department decided that it should wait no longer for the siting council's decision on Edison's capacity needs and, in order to move the bidding process forward, fixed the supply block for Edison's request for proposals at the 132-megawatt minimum. In making that decision, the department stated that important regulatory objectives would be furthered and an opportunity would be created to make "a market comparison for [Edison's] proposed . . . facility." Once again Edison did not appeal from a decision which required it to proceed with soliciting proposals without regard to what the siting council might decide and which continued to point to the cost of Edison's proposed new plant as the benchmark against which the bids would be measured.

The citing council issued its decision on April 10, 1992, concluding that Edison would have excess capacity in 1996 and 1997. Edison then reacted by notifying the department, on April 30, 1992, that it was deferring its proposed new plant and by petitioning, on May 20, 1992, for a delay in the deadline for selecting the successful nonutility generator. Edison asserted that, in the circumstances, a contract with a nonutility generator would unnecessarily increase the cost of electricity to its customers by $237,000,000 and that the council's decision and Edison's postponement of its proposed new plant made the pending request for proposals process "completely out of date." The company objected to the use of

a ceiling price based on the costs of Edison's now deferred new plant. In support of its request to be exempted from seeking proposals from nonutility generators, Edison pointed to 220 Code Mass. Regs. § 8.07(3), which states that "[t]he Department may, where appropriate, grant an exception from any provision of these regulations."

The department did not rule on Edison's request to defer its requests for proposals from nonutility generators for more than a year. On June 25, 1993, by a two-to-one vote, the department denied Edison's petition. The department treated Edison's request as a petition to terminate the process of requesting proposals.[4] The department recognized that its regulations permitted it to grant an exemption "where appropriate" and noted that it had previously required a party requesting an exemption from its regulations to demonstrate the existence of "truly extraordinary circumstances."

The department made its decision "based on information available as of the Company's May 20, 1992 petition" in this proceeding. The department thus refused to consider more recent information that Edision had submitted. The department observed that its 1991 decision had addressed many of the issues now raised and that it continued to believe that ratepayers would benefit "through competition in the electric generation market" which would lead to "least-cost investments with reduced regulatory oversight." The department noted that its 1991 decision had "explicitly provided for the possibility of a finding by the Siting Council that the Company had no need for additional resources" and had fixed a mini-

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[4] On June 1, 1992, Edison had identified the intervenor Altresco as the sole nonutility generator selected pursuant to Edison's requests for proposals. On August 4, 1992, the department issued a stay suspending Edison's obligation to negotiate and execute a contract with Altresco until seven days after the department's decision on Edison's pending petition to defer the request for proposals process and for an exemption from the requirements of the department's regulations.

mum supply block in such an event. For this reason the department said that it was "hard pressed now to accept a finding of no need by the Siting Council as constituting truly extraordinary circumstances that would justify terminating" the request for proposals process.

The department did not, however, discuss a change of circumstance that it had not anticipated in its 1991 decision, namely Edison's deferral, at least for the immediate future, of plans to construct a new plant. The department did not decide whether that change was truly extraordinary. The department's regulations required that the costs of any project proposal be below Edison's avoidable costs at the time that the department approved the request for proposals. 220 Code Mass. Regs. §§ 8.05 (2)-(3). The 1991 decision had accordingly treated the costs of Edison's proposed new plant as "the avoidable unit for the purpose of identifying the size and timing of the supply block, and for the purpose of calculating ceiling price schedules." In seeking a delay, Edison represented that its deferral of the proposed plant significantly altered the merits of its contracting with a nonutility generator.[5]

The department was warranted in construing its own regulation as providing that an exception to its regulations would be "appropriate," only when there were truly extraordinary circumstances. Because the department's 1991 unappealed decision had recognized the possibility that the siting council would conclude that Edison had no need for new capacity and had also determined that the department's objectives would be better served by en-

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[5] Edison had submitted material in support of its initial request for delay that indicated that the ceiling price established for assessing bids of nonutility generators had been 10.18 cents per kilowatt hour during the period of the proposed contract and that, based on updated projections, the ceiling price would be 6.04 cents per kilowatt hour for the same period, well below the nonutility generators' bids that were in the range of 8 to 9 cents per kilowatt hour.

couraging the generation of power by nonutilities, the department was also warranted in concluding that the fact that Edison did not need new capacity, even if true, was not a trully extraordinary circumstance. Whatever the new information disclosed about Edison's need for generating capacity in the near term, it did not contradict the department's previously expressed rationale for ordering the implementation of the request for proposals process. Events that unfold within the range of anticipated possibilities for which an agency has made provision need not be characterized as truly extraordinary. The department acted within its discretion and was not arbitrary or capricious, or acting contrary to law, when it decided that the absence of a need for new generating capacity was not a truly extraordinary circumstance.

We have, however, a different view of the department's unexplained failure to consider whether Edison's withdrawal, or at least deferral, of its proposed new plant, resulting in a contract price that was said to exceed avoided costs, was a truly extraordinary circumstance. The department said, because it had not "had an opportunity to explore the data and assumptions behind that calculation," that it could not rely on Edison's claim that implementation of the department's requirement would unnecessarily cost Edison's customers $273,000,000. This statement is surprising because the department had had the matter before it for over a year. Equally surprising is the decision's failure to advert specifically to the consequences of Edison's withdrawal of its proposal to construct a new generating plant. This change may or may not be a truly extraordinary circumstance in the department's view. There is no way of telling on this record.

Edison was entitled to a reasoned decision on whether this new circumstance, which was not contemplated in the department's 1991 decision, warranted an exception to the department's regulatory requirements. The department failed to furnish an adequate statement of reasons

for its decision on this point as it was obliged to do. See G. L. c. 30A, §§ 11(8) (agency decision must have a statement of reasons) and 14(7)(g) (reversal of agency decision appropriate when substantial rights may have been prejudiced by a decision not in accordance with law) (1992 ed.). Cf. *Massachusetts Auto. Rating & Accident Prevention Bureau* v. *Commissioner of Ins.*, 401 Mass. 282, 287-288 (1987).

A judgment should be entered in the county court that the decision of the department in D.P.U. 92-130 entered on June 25, 1993, is set aside and that the proceeding is remanded to the department for further consideration in light of this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
AT BOSTON

April 8, 1994

IN THE CASE No. SJC-6420

BOSTON EDISON COMPANY

vs.

DEPARTMENT OF PUBLIC UTILITIES & another,

pending in Suffolk County, the Supreme Judicial Court.

No. 93-276

ORDERED, that the following entry be made in the docket; viz., ——

A judgment should be entered in the county court that the decision of the department in D.P.U. 92-130 entered on June 25, 1993, is set aside and that the proceeding is remanded to the department for further consideration in light of this opinion.

By the Court,

/s/ Jean M. Kennett
Clerk

April 8, 1994